THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Roger L. Couch, Circuit Court Judge

Case No. 2013-CP-20-0012

Philip Ethier and Jeanne Ethier , ... Appellants,

v.

Fairfield Memorial Hospital; Guy R. Bibeau, M.D.;
Tuomey Medical Professionals, Inc.; and
Pee Dee Emergency Medical Associates, P.A., ... Defendants

Of whom, Guy R. Bibeau, M.D. is the ..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a medical malpractice action. The Appellants Philip Ethier and Jeanne Ethier filed a Complaint against the Respondent Guy R. Bibeau, M.D. alleging claims for medical malpractice and loss of consortium. (R. 25-34). The original Complaint also named as Defendants Fairfield Memorial Hospital, Tuomey Medical Professionals, Inc. and Pee Dee Emergency Medical Associates, P.A., the latter two of which were dismissed. Prior to trial, the Ethiers entered into a settlement with Fairfield Memorial Hospital for a total of $100,000 which was allocated by the parties to that settlement as follows: $60,000 was apportioned to Philip Ethier's claim and $40,000 was apportioned to Jeanne Ethier's claim. (R. 85-90).

The case proceeded to trial before Circuit Court Judge Roger L. Couch and a jury beginning on March 30, 2015. On April 8, 2015, the jury returned a verdict whereby Philip Ethier was found to have been 70 percent at fault and Dr. Bibeau was found to have been 30 percent at fault. (R. 3-5). The jury also awarded $1.25 million in economic damages and $500,000 in non-economic damages to Mr. Ethier. (R. 4). The jury awarded $250,000 to Mrs. Ethier on her loss of consortium claim. (R. 4-5). Thereafter, on April 30, 2015, Judge Couch entered judgment in favor of Dr. Bibeau on all claims brought by the Ethiers. (R. 1-2).

On April 20, 2015, the Ethiers filed a Motion for New Trial which was supported by the affidavit of juror Sandra Carmichael. They sought a new trial on four separate grounds: (1) juror concealment during the voir dire; (2) juror misconduct during premature deliberations; (3) juror misconduct during deliberations; and (4) pursuant to the thirteenth juror doctrine. (R. 36-37). Dr. Bibeau objected to the consideration of the Carmichael affidavit and opposed the Ethiers' arguments for a new trial absolute. Following the entry of the judgment on April 30, 2015, the Ethiers also filed a motion pursuant to Rule 59(e), SCRCP, to alter or amend the judgment whereby they requested the trial court to "correct" or "amend" the judgment "to state that the result of the jury's verdict is a verdict in favor of Defendant Dr. Bibeau on Philip Ethier's claims and a verdict of $250,000 in favor of Plaintiff Jeanne Ethier on her loss of consortium claim." (R. 92).

On May 12, 2015, Judge Couch conducted a *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999) hearing to voir dire the jurors regarding possible premature deliberations, the possible introduction of extrinsic evidence during the trial or deliberations, and an alleged lack of candor from one juror during pretrial qualification. All jurors who participated in the verdict were summoned and appeared for questioning by the Court on that date.

On June 6, 2015, Judge Couch held a subsequent motion hearing to hear arguments on all pending post-trial motions, which included the Ethiers' Motion for

New Trial and Motion to Alter or Amend Judgment. Thereafter, on September 8, 2015, Judge Couch issued an Order Denying Plaintiffs' Post-Trial Motions. (R. 6-24).

The Ethiers subsequently filed a timely appeal to this Court.

ARGUMENTS

I. The trial court was correct in denying the Appellants' motion for a new trial absolute based on alleged intentional juror concealment during voir dire.

The Appellants Philip Ethier and Jeanne Ethier seek a new trial absolute on the basis of intentional juror concealment during voir dire that was conducted prior to jury selection. In the lower court, the Ethiers argued that "Teresa A. Killian (Juror #72), as a prospective juror, intentionally concealed during voir dire the facts that she personally knew Dr. Guy Bibeau, Jerilyn Wadford, RN, and Rhonda Gwynn, LPN; that she had personally worked with them while employed at Fairfield Memorial Hospital; and that she was biased in their favor due to her personal knowledge of them." (R. 36). On appeal, the Ethiers now insist this is "a slam-dunk case of intentional concealment." *See*, Appellants' Brief, p. 35. They are clearly incorrect. Circuit Court Judge Roger Couch correctly concluded that "intentional concealment by Ms. Killian did not occur, and therefore, no inference of bias can by drawn by this Court." (R. 10). That ruling should be affirmed on appeal.

The applicable standard of appellate review on issues of juror misconduct is very deferential to the trial judge. "Generally, the denial of a new trial motion will be disturbed only upon a showing of an abuse of discretion." *State v. Covington*,

343 S.C. 157, 539 S.E.2d 67, 69 (Ct. App. 2000). "Where a new trial motion is based upon allegations that a juror gave misleading and incomplete answers on voir dire, the trial court's denial of that motion will be affirmed absent a prejudicial abuse of discretion." 539 S.E.2d at 69-70.

In the leading case of *State v. Woods*, 345 S.C. 583, 550 S.E.2d 282 (2001), the South Carolina Supreme Court established a two-part test to determine whether a juror's failure to disclose information during voir dire warrants a new trial. This test was also recently applied by this Court in the case of *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111 (Ct. App. 2014). First, the trial court must find "the juror intentionally concealed the information." *Woods*, 550 S.E.2d at 284. "If the court finds no intentional concealment occurred, the inquiry ends there." *Lynch*, 760 S.E.2d at 116. "However, if the court finds the juror's concealment was intentional, it must then determine whether the concealed information 'would have been a material factor in the use of the party's peremptory challenges.'" *Woods*, 550 S.E.2d at 284.

In *Woods*, the Supreme Court further explained that "intentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Woods*, 550 S.E.2d at 284. In contrast, unintentional concealment occurs "where the question

posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." *Id.* "[W]here the failure to disclose is innocent, no inference of bias can be drawn." *Id.*

In applying this test, Judge Couch was correct in first reviewing the responses of Teresa Killian (juror #72) to voir dire questions to ascertain whether her responses amounted to intentional concealment. The following are the pertinent questions asked during voir dire with Killian's responses:

> THE COURT – **Is there any member of the jury panel who has ever had a close social or a personal relationship with** either the plaintiffs, Philip and Jeanne Ethier, or **the defendant, Guy R. Bibeau**? If that's true, please stand.
>
> (NO RESPONSE)
>
> * * * * *
>
> THE COURT – Now, I'm going to go over a list of individuals who have been identified to me as possible witnesses in this case. Listen carefully, because there is a good number of these individuals, and, in fact, I may end up saying some of these names twice, but I'll try to cover everybody to be sure I've covered them all, so listen carefully to the people who have been identified to me as possible witnesses in this matter. First of all, Jeremiah Holleman, MD. He's with the Sanger Heart and Vascular Institute in Charlotte. Carl Adams, MD of Durango, Colorado. Scott Joplin, (sic) MD, of Old Saybook, Connecticut, Tammy Chen, MD, with the Southern Psychiatric Practice in Rock Hill, South Carolina, Mark Porter, MD, of Metrolina Neurological Associates in

Rock Hill, South Carolina, Sanjay Nandurkar, MD, of Piedmont Interventional Spine & Pain Center in Lancaster, Eric Weinstein, MD, of Summerville, South Carolina, Charlie Dorn Smith, III, MD, of Florence, South Carolina, Dr. Oliver Wood, a PHD from Columbia, South Carolina, Joel Leonard of Leonard & Associates in Columbia, Shelene Giles of FIG Services in Hendersonville, North Carolina, Gerald Johnson, MD, of Pee Dee Emergency Medical Associates in Manning, Angie Johnson of Pee Dee Emergency Medical Associates in Manning, South Carolina, Samantha Anthony, CNA, Jerilyn Wadford, RN, in Columbia, Rhonda Gwynne, LPN, in Winnsboro, George Duquette of Chester, South Carolina, Lorraine Duquette of Chester, South Carolina, Jeffrey Gaskill of Indian Trail, North Carolina, Kathleen Gaskill of Indian Trail, North Carolina, Dr. Carl Adams, Todd Keith, Registered Nurse, Dr. Larry Canty, with Medical Director at Fairfield Memorial, Michael Williams, CEO of Fairfield Memorial, Marc Harari — it's H-a-r-a-r-i, a PHD, Jennifer Kimbrell, Tammy Chen, NaMetris Blount, a PHD with Palmetto Counseling and Consulting, David Sward, a masters in education and a professional counselor, Karen Thompson, RN, Joel Leonard, vocational consultant, Dr. Gerald Johnson, or Angie Johnson with Pee Dee Emergency Medical, Eric Weinstein, an MD, Dorn Smith, an MD, Rhonda Gwynne, an RN, registered nurse, Jerilyn Wadford, an LPN and Patti Locklair. Now, as to the individuals that I just identified as possible witnesses in this case, **has any member of the jury panel ever been related by marriage or are you related by blood or have you ever had a close social or a personal relationship with the people that I've identified as possible witnesses?** If that's true, please stand.

(JUROR STANDS)

THE COURT – Ma'am, your name and number?

JUROR – Teresa Killian, juror 72. I used to work at Fairfield Memorial Hospital with Mike Williams.

THE COURT – So you knew him from that employment?

JUROR – Yes, sir.

THE COURT – You no longer work there. Is that right?

JUROR – Right.

THE COURT – Okay. How long ago did you work there?

JUROR – It's been about three, four years ago.

THE COURT – I see. Now, ma'am, if that person were to be a witness in this case and you were seated on the jury, would that fact affect your ability to be fair and impartial to both the plaintiff and the defendant in case?

JUROR – No, sir, it wouldn't. I could be fair.

THE COURT – All right. Okay, thank you, ma'am, you can be seated. Anyone else?

(NO RESPONSE)

(R. 512-515). (Emphasis added). Thus, as the highlighted language shows, Judge Couch asked Juror Killian whether she had a "close social or a personal relationship" with Dr. Bibeau and the other witnesses.

Judge Couch also engaged in extensive questioning of Juror Killian during the May 12, 2015 hearing regarding her responses to the voir dire questions, her understanding of those questions and the bases for her responses. Killian

acknowledged that she had worked at Fairfield Memorial Hospital for about two years from 2007 to 2009 (R. 308), that she worked on the medical floor and in the emergency department (R. 309-310), that she worked triage in the emergency department (R. 310-311), and that she worked with Dr. Bibeau and Nurse Wadford but did not know them socially. (R. 312-313). Killian also testified she worked with Nurse Gwynne. (R. 315). Killian explained that she did not view her relationship with Dr. Bibeau and the nurses as a "close social or personal relationship" which was the precise voir dire question asked. She distinguished them from Mike Williams, a Hospital employee, that she did acknowledge knowing during the voir dire. However, she explained that Williams had actually treated her son and she knew him from outside the Hospital. (R. 316-319).

Judge Couch ultimately ruled "that Ms. Killian did not intentionally conceal from the litigants or the Court her past professional relationship with several witnesses." (R. 9). Judge Couch made a number of key findings to support that conclusion. First, he found "that the voir dire questions did not directly ask the potential jurors about work or professional relationships. A reasonable juror could have reasonably understood the voir dire as asking only about personal or social relationships with the witnesses." (R. 9). Second, Judge Couch found "it reasonable that Ms. Killian understood the questions to be about personal friendships or other social relationships and that she felt those types of

relationships are separate and distinct from relationships that may have only existed in and were generated by the workplace." (R. 9-10). Third, Judge Couch noted that "Ms. Killian did in fact disclose she had worked at Fairfield Memorial Hospital during the time Dr. Bibeau was employed there" and that she "made no attempt to conceal her employment history." (R. 10). If Juror Killian *intended* to deliberately conceal her history with Dr. Bibeau and the nurses, she would not have revealed that she had worked at Fairfield Memorial Hospital. That was voluntarily offered by her.

Moreover, the fact that Killian did make it known that she had been employed at the Hospital placed the impetus to request additional information on the Ethiers' counsel. As this Court recognized in *Lynch*, "the responsibility for obtaining such information falls on the attorneys to request precise voir dire questions that are reasonably comprehensible to the average juror." *Lynch*, 760 S.E.2d at 117. Here, as Judge Couch explained, "when given the opportunity, the Plaintiffs' counsel failed to request any follow up voir dire questions about who she knew or may have had contact with during her prior employment at the hospital." (R. 10).

This is a critical point particularly given the specific nature of the voir dire questions that were asked. The jury panel was asked about "close social or personal relationships," and as Judge Couch noted, that phrasing "interjects

subjectivity and interpretation for the juror, and Ms. Killian cannot be criticized for the manner in which she construed that language." (R. 10). He explained that "[t]he use of the phrasing 'close social or personal relationship' reasonably suggests a relationship much different than simply knowing a person or working with him or her at one time." (R. 10).

It is well settled that "[w]hether a juror's failure to respond is intentional is a fact intensive determination that must be made on a case-by-case basis." *State v. Sparkman*, 358 S.C. 491, 596 S.E.2d 375, 377 (2004). Furthermore, appellate courts will "defer to the sound judgment of the trial judge" who is "in the best position to determine the credibility of the jurors." *State v. Covington*, 343 S.C. 157, 539 S.E.2d 67, 71 (Ct. App. 2000); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99, 104 (1998). *See also*, *State v. Loftis*, 232 S.C. 35, 100 S.E.2d 671 (1957) (refusing to interfere with the discretion of a trial judge in matters involving the jury because the trial judge has the opportunity to consider the credibility of the jurors).

Here, the Ethiers have not shown any abuse of discretion. Judge Couch made the appropriate review of the voir dire questions. He examined Juror Killian under oath about her answers and reasons for those answers. He ultimately concluded "that Ms. Killian reasonably responded to the questions asked during pretrial voir dire" and that "intentional concealment by Ms. Killian did not occur."

(R. 10). Moreover, he noted that the Ethiers' counsel had the opportunity to ask follow-up voir dire questions including a specific inquiry whether Killian "knew" or "worked with" the parties or witnesses, but such questions were never posed. In sum, Judge Couch's rulings on the intentional concealment issue are not in error and should be affirmed.

Moreover, as an alternative position, the Ethiers have raised a new issue for the first time on appeal which is unpreserved for appellate review.[1] The Ethiers argue that even if this were a case of "unintentional concealment," a new trial absolute should be granted because they have shown prejudice. The Ethiers, however, never made this argument to Judge Couch, nor does his order address an "unintentional concealment." In fact, in their motion for new trial, the Ethiers specifically wrote: "This case is *not* a case of unintentional concealment because the Court's questions were *not* ambiguous or incomprehensible to the average juror, and the subject of the inquiry was *not* insignificant or so far removed in time that Killian's failure to respond is reasonable." (R. 108). (Emphasis in original). Moreover, during the hearing on their motion for new trial, Ethiers' counsel never

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[1] In *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original).

made this alternative argument.

Finally, as to the merits, it is well settled that, pursuant to the two part test from *Woods* and *Lynch*, "[i]f the court finds no intentional concealment occurred, the inquiry ends there." *Lynch*, 760 S.E.2d at 116. *See also*, *State v. Sparkman*, 358 S.C. 491, 596 S.E.2d 375, 378 (2004) ("[b]ecause Scott's concealment was unintentional, our inquiry is over"). In sum, the Ethiers are not entitled to a new trial absolute for an unintentional concealment, which bears repeating is a finding Judge Couch never made (nor was asked to make). To the contrary, he concluded that "Ms. Killian reasonably responded to the questions asked during pretrial voir dire." (R. 10). Thus, there was no unintentional concealment.

II. The trial court was correct in denying the Appellants' motion for a new trial absolute based on alleged juror misconduct committed during preliminary deliberations and then later during jury deliberations.

The Ethiers also seek a new trial absolute on the basis of alleged juror misconduct committed during preliminary deliberations and then later during jury deliberations. Those issues were raised as separate grounds in the trial court and were addressed separately by Judge Couch. On appeal, the Ethiers now jumble the two issues and treat them as the same, which they are not.

While the analysis of the two issues are different in certain respects as discussed below, the standard of review is not. In *State v. Aldret*, 333 S.C. 307,

509 S.E.2d 811 (1999), the South Carolina Supreme Court reiterated that "the trial court has broad discretion in assessing allegations of juror misconduct." 509 S.E.2d at 814. "[U]nless the misconduct affects the jury's impartiality, it is not such misconduct as will affect the verdict." *Id.* *See also*, *Lynch*, 760 S.E.2d at 114 ("it is within the trial court's discretion to grant a new trial based on juror misconduct during deliberations").

As to both issues, it is noted that the Ethiers make only conclusory arguments. They treat the standard of review as though it was *de novo*. In effect, they re-argue the merits of their position rather than even attempting to show an abuse of discretion committed by Judge Couch. The appeal will not turn on whether the appellate court would have ruled differently *de novo*. Instead, the issue is whether Judge Couch committed an error of law that gives rise to an abuse of discretion. The Ethiers have failed to make that showing on either issue.

A. Juror Misconduct in Preliminary Deliberations

In the trial court, the Ethiers claimed that "Teresa A. Killian, as a seated juror, engaged in misconduct by: (1) stating throughout the trial in premature jury deliberations that she personally knew Dr. Bibeau and nurses Wadford and Gwynn because she had personally worked with them; (2) unlawfully and improperly offering inadmissible, irrelevant and unfairly prejudicial evidence by vouching

personally for the alleged credibility, skill and knowledge of Dr. Bibeau and the two nurses, and by stating throughout the trial in premature deliberations that all three persons were thorough and careful in their work, and that if they said they did something, then they did it; and (3) by unlawfully and improperly expressing her bias during premature deliberations in favor of Dr. Bibeau and the nurses due to her personal knowledge of them." (R. 36).

As Judge Couch correctly ruled, the issue surrounding premature deliberations by a jury is a question of fundamental fairness. In *State v. Aldret*, 333 S.C. 307, 509 S.E.2d 811 (1999), the Supreme Court held that "premature jury deliberations may affect 'fundamental fairness' of a trial such that the trial court may inquire into such allegations and may consider affidavits in support of such allegations." 509 S.E.2d at 813. The Supreme Court then proceeded to provide a "suggested procedure to follow in cases in which an allegation of premature deliberations arises." 509 S.E.2d at 815. The Supreme Court explained:

> If ... the fact of the premature deliberations does not become apparent until after the jury's verdict, we hold the trial court **may** consider affidavits [on the issue of premature deliberations]. If the trial court finds the affidavits credible, and indicative of premature deliberations, an evidentiary hearing should be held to assess whether such deliberations in fact occurred, and whether they affected the verdict. At such an evidentiary hearing, the trial court may, upon request of the moving party, reassemble the jurors and conduct voir dire to ascertain the nature and extent of the premature deliberations. If the court determines the misconduct did

> not occur, or that it was not prejudicial, adequate findings should be made so that the determination may be reviewed.

Id. (Emphasis in original) (Citation omitted).

The Ethiers' motion was supported by an affidavit from juror Sandra Carmichael which raises the issue of juror misconduct in initiating preliminary deliberations. The court's consideration of that affidavit is governed by Rule 606(b) of the South Carolina Rules of Evidence which allows a juror to offer testimony as to "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." Rule 606(b), SCRE. Rule 606(b) further provides:

> Upon an inquiry into the validity of a verdict ..., a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, ... [n]or may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Id. Therefore, as the Supreme Court has recognized, Rule 606 "draws a distinction between evidence of external influences on the jury's deliberations and comments of jurors occurring during deliberations. While the rule allows evidence of the former to be introduced, it prohibits the introduction of the latter." *Shumpert v.*

State, 378 S.C. 62, 661 S.E.2d 369, 371 (2008). The Supreme Court further explained that "juror testimony involving internal misconduct may be received only when necessary to ensure fundamental fairness." *Id.*

Dr. Bibeau had argued that the Carmichael affidavit does not rise to the level of extrinsic misconduct as set forth in Rule 606(b). In her affidavit, Juror Carmichael describes statements made by Juror Teresa Killian that began during the second or third day of trial and continued into the jury's deliberations. Carmichael characterized these statements as indicating that Killian had worked with Dr. Bibeau and Nurse Jerilyn Wadford at Fairfield Memorial Hospital and were made to bolster their professional work abilities and credibility. (R. 64-65). After reviewing the Carmichael affidavit, Judge Couch found it to be sufficiently credible to justify further inquiry by the court and held a hearing as described in the *Aldret* decision to determine if misconduct occurred and if so, what effect, if any, it may have had on the outcome of the case. All jurors who participated in the finding of the verdict in this case were present and did testify at the hearing which was held on May 12, 2015.

As indicated, the Supreme Court has used "the language of 'fundamental fairness' to describe the constitutional implications of juror misconduct." *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 384 S.C. 441, 682 S.E.2d 489, 493 (2009). The Supreme Court has cautioned,

however, that "not all juror misconduct impinges upon the fundamental fairness of a trial." *Id.* The Supreme Court explained that "[a] defeated party is not entitled to a new trial for every act of misconduct by or affecting the jury, as such misconduct does not *ipso facto* justify the grant of a new trial; but in order that a new trial may be granted on such ground the misconduct of the jury must relate to a material matter in dispute and must be such as to indicate an influence of bias or prejudice in the minds of the jurors." *Id.*

As Judge Couch determined, the standard for evaluating alleged juror misconduct requires proof of the resulting prejudice by clear and convincing evidence. *See, Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 384 S.C. 441, 682 S.E.2d 489, 494 (2009) (Court explained that trial court found "no clear and convincing evidence that any of the twelve jurors ... were improperly influenced by [the juror's] misconduct"). *See also, Aldret,* 509 S.E.2d at 814, *citing Hunt v. Methodist Hospital*, 240 Neb. 838, 485 N.W.2d 737 (Neb. 1992) ("party claiming juror misconduct has burden to prove prejudice by clear and convincing evidence"). Therefore, as Judge Couch ruled, the Ethiers "cannot rest upon evidence that misconduct merely occurred, but

rather must prove prejudice resulting from that misconduct by clear and convincing evidence." (R. 14).[2]

This Court has previously held that a misunderstanding of one juror or an inappropriate comment made during the course of the trial does not warrant setting aside a verdict. *State v. Galbreath*, 359 S.C. 398, 406, 597 S.E.2d 845, 849 (Ct. App. 2004). Litigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials. *Smoak v. Seaboard Coast Line Railroad Company*, 259 S.C. 632, 193 S.E.2d 594, 598 (1972). "If a new trial was required every time a flaw or mere possibility of prejudice occurred, litigation would be unduly prolonged." *Id.* *See also*, *Aakjer v. Spagnoli*, 291 S.C. 165, 352 S.E.2d 503 (Ct. App. 1987).

Judge Couch recognized that this case involved "a five day trial which involved rather tedious testimony" and "that given the length and nature of trial it is not surprising that a juror may make some comments as the trial progresses." (R. 14). When that does happen, a court must decide whether a new trial is

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[2] During the hearing, the Ethiers' counsel questioned whether the proper standard is clear and convincing or preponderance of the evidence. Judge Couch applied the clear and convincing standard, which is supported by case law. Nonetheless, on appeal, the Ethiers do not challenge or object to the use of the clear and convincing standard, and as a result, that constitutes the law of the case. In *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 489 S.E.2d 470 (1997), this Court explained that an "unappealed ruling is the law of the case" and the unappealed ruling "should not have been reconsidered by the Court of Appeals." 489 S.E.2d at 472. This Court has also routinely held that an "unappealed ruling, right or wrong, is the law of the case." *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d 869, 871 (2000); *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653, 673 (2006).

warranted. In doing so, the inquiry is whether the evidence shows prejudice in that the improper comments shaped the final deliberations or that the moving party was prejudiced by the comments. As indicated, this should be shown by clear and convincing evidence to justify the court invading the sanctity of the jury room and setting aside the verdict.

Ultimately, Judge Couch found that "Ms. Killian did make statements that were heard by several jurors concerning her work experience with the Defendant and Nurse Wadford. However, the Court concludes that these statements had no real effect on the consideration of the verdict in this case." (R. 15). More specifically, Judge Couch determined that the comments by Juror Killian "were based only on her own experiences and, therefore, would be internal influences on the jury rather than external influences or from extraneous matters." (R. 15). He also found that no jurors engaged Killian and that "the vast majority of the jurors did not recall the statements being made or indicated that the statements had no bearing on their ultimate verdict in the case." (R. 15). He thus denied the Ethiers' motion for a new trial absolute upon concluding as follows:

> The Court does not find that Ms. Killian's comments during breaks in the trial had any effect on the jurors – Ms. Carmichael included – so as to render the trial fundamentally unfair. The Court does not find that any misconduct by Ms. Killian as ascertained from the jurors' testimony actually influenced the jury's verdict.

(R. 15).

Judge Couch's findings in this regard are fully supported by the evidentiary record. The Ethiers have not shown any error of law in his analysis nor an absence of evidence to support those findings. The findings are entitled to great deference and therefore should not be overturned absent an error of law. The denial of a new trial absolute with respect to the preliminary deliberations issue should be affirmed.

B. Juror Misconduct During Deliberations

The Ethiers have also sought a new trial absolute on the basis of juror misconduct committed by Juror Teresa Killian during jury deliberations. As this Court recently instructed, "[i]nitially, the trial judge must make a factual determination as to whether juror misconduct has occurred." *Lynch v. Carolina Self Storage Centers, Inc.*, 409 S.C. 146, 760 S.E.2d 111, 114 (Ct. App. 2014). In addition, the Ethiers must also prove by clear and convincing evidence that prejudice actually occurred as a result of that misconduct.

The Ethiers allege that Juror Killian committed misconduct during the jury deliberations by describing Dr. Bibeau as being a "good doctor" and by claiming that Dr. Bibeau and the nurses were "thorough and competent." Judge Couch found that such comments "were based only on her own experiences and, therefore, would be internal influences on the jury rather than external influences

or from extraneous matters." (R. 16). The Ethiers do not challenge the ruling on appeal.

Importantly, in *Lynch*, this Court explained that "[i]nternal influences involve information coming from the jurors themselves." *Lynch*, 760 S.E.2d at 115, *citing State v. Ziegler*, 364 S.C. 94, 610 S.E.2d 859, 867 (Ct. App. 2005). Judge Couch thus ruled that "[b]ecause the comments attributed to Ms. Killian are internal influences, the testimony regarding such statements is inadmissible under Rule 606(b), SCRE, consistent with the analysis by the Court of Appeals in *Lynch*." (R. 16). He accordingly ruled that "the evidence of the juror misconduct is actually inadmissible, and the Plaintiffs' proof fails on that basis." (R. 16). Again, the Ethiers have not appealed that ruling, and that implicates the two-issue rule as a basis for affirmance.[3]

Judge Couch further concluded that "the Plaintiffs have not satisfied their burden of proving by clear and convincing evidence any resulting prejudice to the jury from Ms. Killian's comments." (R. 17). Judge Couch observed that "none of the jurors, with the exception of Ms. Carmichael, indicated that the comments

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[3] In applying the "two-issue" rule, the Supreme Court explained that "where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott*, 387 S.C. 339, 692 S.E.2d 900, 903 (2010). Similarly, in *Folkens v. Hunt*, 290 S.C. 194, 348 S.E.2d 839 (Ct. App. 1986), this Court held that "[a]n alternative ruling of a lower court that is not excepted to constitutes a basis for affirming the lower court and is not reviewable on appeal." 348 S.E.2d at 845.

made by Ms. Killian had any bearing on their deliberations or the verdict that was reached. Each juror testified he or she decided the case on the law and evidence presented at trial." (R. 17). Based thereon, he ruled that "the deliberations conducted in this case do not violate fundamental fairness and that the actions of Ms. Killian in this case are not such that would justify a new trial." (R. 17). The Ethiers have shown no abuse of discretion with that ruling.

Focusing as well on Sandra Carmichael, who was sought out by the Ethiers' counsel after the trial and who provided the affidavit that started this process, Judge Couch found what he termed "insufficient proof of prejudice." (R. 17). During the *Aldret* evidentiary hearing, Carmichael testified as follows:

> Q. But my concern is whether or not the statement that had been made prior to your entering deliberations that you referred to as having been made by Theresa, did that have any effect on your deliberations in the case?
>
> A. I think it did a little.
>
> Q. Can you tell me in what way?
>
> A. Because when we got back there we was -- several of us was leaning towards in favor of the plaintiff and she kept on repeating the reputation and some of the jurors changed their minds and left only two of us with the plaintiff, and basically was like, well, if she worked with this man and she knew that he was a good doctor, well, then may be he didn't, you know, sign those papers. She knew him.

Q. Okay, so it did have some effect on your ultimate decision?

A. Yeah. She stated several times that she knew him and he was a good, reliable doctor.

(R. 296).

Citing that testimony, Judge Couch points out that Juror Carmichael responded, "I think it did a little" when she was asked whether Juror Killian's comments had an effect on her own deliberations. (R. 296). He focused on her use of the words "I think" as being "suggestive that she has a certain degree of uncertainty" and that there was "only a possibility of prejudice even within her own subjective thought process." (R. 18). In addition, Judge Couch proceeded to find "that it is more likely than not that Ms. Carmichael simply changed her mind after the verdict was rendered and after her jury service had ended, but that does not support a finding of prejudice. Her perception of impropriety is in stark contrast to every other juror who testified that no prejudice occurred during the trial or during deliberations." (R. 18-19). In this respect, the Supreme Court's observation in *Shumpert v. State*, 378 S.C. 62, 661 S.E.2d 369 (2008), is pertinent:

> We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed. The generic assertion that a juror would vote the opposite way if given another opportunity too closely resembles a case of buyer's remorse from a guilty verdict

> to be given much credence. Moreover, although the juror avers that if he had the preliminary vote to do over again, he would cast an initial vote to acquit, this testimony does not relate to the juror's ultimate vote of guilty. The jury returned a unanimous verdict, and the trial court polled the jury after it returned a verdict.

661 S.E.2d at 372.

Judge Couch also supported his ultimate ruling with other observations, none of which have been refuted by the Ethiers on appeal. In particular, he recognized that "the jurors' testimony as a whole strongly demonstrates that Ms. Killian was not a leader on that jury" and that "[s]he was not a juror with any particular influence over other jurors." (R. 19). Also, in assessing the effect on the verdict, Judge Couch was "cognizant of the ultimate verdict" and explained as follows:

> The jury, including Ms. Carmichael as well as Ms. Killian, did not return a verdict absolving the Defendant of all fault. To the contrary, this jury found the Defendant thirty percent at fault and, when asked to determine damages, awarded $1.75 million for Mr. Ethier and $250,000 for Mrs. Ethier. Thus, the jury, including both Ms. Carmichael and Ms. Killian, found negligence on the part of the Defendant and awarded substantial damages. That is further evidence to the Court that any comments by Ms. Killian regarding her personal opinion did not impact the fundamental fairness of the trial or the jury deliberations.

(R. 19). Indeed, the comments attributed to Juror Killian, i.e., that Dr. Bibeau was a "good doctor," did not prevent the jury from finding a breach of the standard of

care by Dr. Bibeau. Those generalized comments would have an impact, if any, only on whether there was a breach and not the allocation of fault between the doctor and the patient. But, the Ethiers clearly prevailed on showing a breach of the standard of care – thus, there is no prejudice.

Finally, Dr. Bibeau submits that the Supreme Court's decision in *Vestry and Church Wardens of Church of Holy Cross v. Orkin Exterminating Co., Inc.*, 384 S.C. 441, 682 S.E.2d 489 (2009), is particularly instructive. In that case, the trial judge received information that a juror named Abrams committed misconduct in numerous particulars including personally viewing the building at issue and informing the jury of her opinions of its condition, consulting with a painter and advising the jury what the painter told her, and consulting with her own minister and sharing her minister's comments with the jury. Abrams also made comments that the plaintiff "has money" and was trying to get someone else "to pay their bills." The trial judge held a hearing and those allegations were "in large measure" corroborated by the other jurors, but as the Supreme Court explained, "none of the jurors indicated that their final deliberations were affected by Abrams' misconduct." 682 S.E.2d at 491. The trial judge ultimately denied the plaintiff's motion for a new trial. This Court reversed, but the Supreme Court then on certiorari upheld the trial judge's denial of a new trial. The trial judge's rulings, which were affirmed by the Supreme Court, are described as follows:

> On February 22, 2006, the judge issued an order denying Holy Cross's motion for new trial. The judge found that Holy Cross failed to "demonstrate prejudice affecting the impartiality of the verdict," and that "[t]he statements and actions by Ms. Abrams were not of a kind to impermissibly influence the jury or effect the verdict." The judge noted that there was nothing Abrams could have learned from driving to the church that was not already apparent from photographs in evidence. Likewise, the judge found that the statement made by the painter was consistent with statements made by Holy Cross's witnesses and therefore did not unduly prejudice Abrams's deliberation. Finally, the judge found that there was no evidence that Abrams's comments shaped the final deliberations or improperly influenced the other jurors, in light of the testimony indicating that the jurors admonished Abrams, "laughed off" her comments, and generally paid her little attention. The judge concluded that, "having conducted an extensive individual voir dire of each juror and having viewed the conduct of the offending juror, this Court has found no indication that the jury's unanimous verdict was compromised, and [Holy Cross] has not made the showing of any prejudice by clear and convincing evidence, as required by the applicable case law."

682 S.E.2d at 491-492.

As Judge Couch also recognized, the allegations of juror misconduct committed by Juror Killian in the present case "pale in comparison to the misconduct of juror Abrams in *Church of Holy Cross*." (R. 20). In fact, the trial judge in that case held the juror in contempt of court for her conduct. Yet, most importantly, in *Church of Holy Cross*, the Supreme Court stressed the deferential standard of review and found no basis to reverse the trial judge. The Supreme

Court upheld on appeal the finding by the trial judge "that there was no clear and convincing evidence that any of the twelve jurors – including Abrams – were improperly influenced by Abrams' misconduct." 682 S.E.2d at 494.

This Court will apply that same deferential standard of review, and it is submitted the same result should occur in this case. Judge Couch concluded that "the misconduct of Ms. Killian, which is limited at most to interjecting her personal opinion that the Defendant is a 'good doctor' and is 'thorough and careful,' did not shape or improperly influence the jury deliberations." (R. 20). He found no violation of fundamental fairness. Those rulings are all supported by the evidence and are not impacted by any error of law. Quite simply, the Ethiers with their largely conclusory briefing on this issue – where they do not address any specific finding made by Judge Couch – have failed to show any abuse of discretion so as to warrant a reversal and remand for a new trial absolute.

III. The trial court was correct in entering a judgment for the defense on the loss of consortium claim because the Appellants failed to establish liability on the injured spouse's medical malpractice claim. Alternatively, the verdict on the loss of consortium claim is subject to a reduction under S.C. Code Ann. § 15-38-15 as well as an equitable and/or statutory set-off based on the pre-trial settlement reached by the Appellants with Fairfield Memorial Hospital.

At the close of the trial, the jury returned a Special Verdict Form whereby it found Philip Ethier seventy percent at fault and Dr. Bibeau thirty percent at fault.

The jury also found in favor of Jeanne Ethier on her consortium claim and awarded damages of $250,000. (R. 3-5). On April 30, 2015, Judge Couch entered a judgment that states:

> A Verdict was issued by the jury in the above captioned matter on April 8, 2015, a copy of which is attached and incorporated herein by reference. The Plaintiff was found to have been 70% negligent and the Defendant was found to have been 30% negligent. The result is a Verdict in favor of the Defense.

(R. 1). Consequently, Judge Couch entered a verdict for Dr. Bibeau on all claims.

Jeanne Ethier thereafter filed a motion pursuant to Rule 59(e), SCRCP, requesting that "the Form 4 order and judgment be corrected or amended to state that the result of the jury's verdict is a verdict in favor of Defendant Dr. Bibeau on Philip Ethier's claims and a verdict of $250,000 in favor of Plaintiff Jeanne Ethier on her loss of consortium claim." (R. 92). Judge Couch denied that motion.

As Judge Couch ruled, this case is remarkably similar to and controlled by the case of *Lee v. Bunch*, 373 S.C. 654, 647 S.E. 2d 197 (2007). In *Lee*, as in this case, there was a finding by the jury that the plaintiff was seventy percent negligent, and as a result, the defendant was found not liable to the plaintiff on the injured spouse's negligence claim. The Supreme Court in *Lee* explained that "[g]enerally, a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails, whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." 647 S.E.2d at 202, *citing*

41 Am. Jur. 2d *Husband and Wife* § 227 (2007). The Supreme Court also cited to the case of *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 395 S.E.2d 742 (Ct. App. 1990), for the holding that "[a] husband could not recover on loss of consortium because the jury found that the wife was not entitled to recover on her strict liability claim." *Id.*

Likewise, in *Creighton v. Coligny Plaza Limited Partnership*, 334 S.C. 96, 512 S.E.2d 510, 523 (Ct. App. 1999), a case not cited in *Lee*, this Court explained that "[i]n order to prevail in an action for loss of consortium, a plaintiff must prove the defendant's *liability* for the spouse's injuries, as well as damages to the plaintiff resulting from the spouse's injury." 512 S.E.2d at 523. (Emphasis added). In that case, the negligence action and the consortium action were tried together by consent. Based thereon, after the jury found the defendants were not liable to the injured spouse on the negligence claim, the trial court entered a judgment in the defendant's favor on the consortium claim. *See*, 512 S.E.2d at 522 ("At the conclusion of the liability trial, the trial judge entered judgment reflecting the jury verdict for the defendants and simultaneously dismissed the loss of consortium claim by order 'because of a defendant verdict on companion case'"). This Court pointed out that "the only issue during the two day trial was defendants' *liability* for Ms. Creighton's slip and fall. This determination was a prerequisite to recovery in both the negligence and loss of consortium cases." 512 S.E.2d at 523. (Emphasis

added). Again, because there was no *liability* for the injured spouse's claim, there can be no liability for the consortium claim.

In *Lee*, while finding the defendant driver thirty percent negligent and thus not liable to the injured spouse, the jury issued a defense verdict on the consortium claim. The trial judge then determined that the verdicts were inconsistent and required the jury to return a monetary amount. The jury returned a verdict of $9,000 on the consortium claim. On appeal, the defendant requested that the original verdicts be reinstated, which was the relief ultimately awarded by the Supreme Court. The Supreme Court distinguished other consortium cases by recognizing that "the jury determined Bunch was not liable on Lee's primary negligence claim." 647 S.E.2d at 202.

Importantly, the Supreme Court in *Lee* did not disregard that "claims for personal injuries and for loss of consortium are separate and distinct." 647 S.E.2d at 201. But, in the context of a negligence case where the injured spouse's claim failed because he was found more than fifty percent at fault, the Supreme Court ruled that the defendant could not be held liable for the consortium claim just as he could not be held liable for the injured spouse's claim. The Court noted that this was the correct result "whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." 647 S.E.2d at 202. That result was also consistent with this Court's decision in *Creighton.*

That is the precise same fact pattern in the present case, where the negligence and consortium claims were tried together because they were joined in one lawsuit. The percentages of fault are even identical as in *Lee*. Philip Ethier was found seventy percent at fault, like the injured spouse in *Lee*. Dr. Bibeau was found thirty percent at fault, like the defendant in *Lee*. The Supreme Court explained that "a plaintiff spouse's claim for loss of consortium fails if the impaired spouse's claim fails." 647 S.E.2d at 202. That is the exact scenario in the present case – Dr. Bibeau was found not liable for the injured spouse's claim. As a result, Judge Couch correctly applied the *Lee* decision and ruled that the plaintiff spouse's consortium claim fails.

On appeal, the Ethiers spend countless pages to cite many cases that hold that a consortium claim in South Carolina is separate and independent and is not derivative. The *Lee* case already acknowledges the state of the law as such (as does the *Creighton* case), but the Supreme Court also explains that the result reached in the present case, like it was in *Lee*, is correct "whether the claim is considered separate and independent from the impaired spouse's claim or derivative in nature." 647 S.E.2d at 202. The *Smith v. Ridgeway* case, while a strict liability claim rather than a negligence claim, supports that same principle, as does the *Creighton* case.

In sum, Judge Couch was correct in applying the holding from *Lee v. Bunch*, a case with remarkably similar facts as the present case. The judgment in favor of Dr. Bibeau on the consortium claim should likewise be affirmed because quite simply the Ethiers both failed to prove Dr. Bibeau's liability for Mr. Ethier's claim.

Nonetheless, in the trial court, Dr. Bibeau preserved additional issues in the event that the court agreed that Mrs. Ethier could recover on her consortium claim where her husband's claim was barred. Should this Court make that ruling, then Dr. Bibeau submits that the verdict on the loss of consortium claim in favor of Mrs. Ethier is subject to (1) a reduction of the verdict under S.C. Code Ann. § 15-38-15 and (2) an equitable and/or statutory set-off based on the pre-trial settlement reached by the Ethiers with Fairfield Memorial Hospital. Those issues would need to be addressed on remand, or in the Court's discretion, could be addressed as part of the resolution of this appeal. Dr. Bibeau simply wants to make certain those issues are preserved for a decision, should Mrs. Ethier prevail on her appeal issue.

To briefly address the merits of those arguments, which were also argued to Judge Couch, Dr. Bibeau clearly should not be forced to pay all of Mrs. Ethier's consortium damages if he was only thirty percent at fault. That was actually part of the rationale of the Supreme Court in *Lee* where the Court recognized that "Bunch should not be forced to pay all of Mrs. Lee's damages if he only contributed 30% to the accident." *Lee*, 647 S.E.2d at 202. More specifically,

Section 15-38-15 was adopted as part of tort reform in 2005, and addresses the apportionment of fault in cases where there are multiple tortfeasors. Specifically, Section 15-38-15(A) provides that "[a] defendant whose conduct is determined to be less than fifty percent of the total fault shall only be liable for that percentage of the indivisible damages determined by the jury or trier of fact." S.C. Code Ann. § 15-38-15(A). In the present case, Dr. Bibeau was held to be only thirty percent at fault, and as a result, he should be liable, at most, for thirty percent of the consortium damages. The other tortfeasor, that being Philip Ethier, was deemed to be seventy percent at fault, and as a result, he should be liable for the rest of the damages.

It is anticipated that the Ethiers will argue that Section 15-38-15(A) addresses apportionment of monetary fault among *defendants* rather than tortfeasors and that this case has but one defendant (even though there are two tortfeasors who were found at fault). Clearly, the spirit of Section 15-38-15(A), if not the express letter, of the statute applies to this situation. Indeed, to make Dr. Bibeau fully liable for the consortium damages only because one of the tortfeasors whose fault was determined is a "plaintiff" rather than a "defendant" would violate equal protection. Moreover, taking the Ethiers' logic to its extreme, then Section 15-38-15(A) would have no application in a case with a counterclaim where the

"defending party" – i.e., the tortfeasor – is a plaintiff. That is truly absurd.[4] Moreover, the Ethiers' argument ignores completely Section 15-38-15(D), which states: "A defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." S.C. Code Ann. § 15-38-15(D). Thus, the fault of another tortfeasor – here Philip Ethier who the jury found to be seventy percent at fault – may be considered in the apportionment. In short, Dr. Bibeau should be held liable, at most, for thirty percent of the $250,000 verdict, which equates to $75,000.

Moreover, prior to trial, the Ethiers settled with Fairfield Memorial Hospital for $100,000. (R. 85-90). Of that amount, the parties to the settlement, including the Ethiers, agreed to an apportionment of $40,000 to Mrs. Ethier's claims. (R. 85). Dr. Bibeau is therefore entitled to a set-off for the $40,000 under both equitable and statutory set-off theories.

By way of brief explanation, Section 15-38-50 is part of the South Carolina's Uniform Contribution Among Tortfeasors Act (UCATA) which was enacted by the General Assembly in 1988. Prior to 1988, however, South Carolina courts

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[4] *See, Lancaster County Bar Association v. South Carolina Commission on Indigent Defense*, 380 S.C. 219, 670 S.E.2d 371, 373 (2008) ("[i]n construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature").

allowed for an equitable set-off for amounts paid in settlement by settling tortfeasors. In *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967), the South Carolina Supreme Court recognized that "one tortfeasor is entitled to credit for the amount paid by another tortfeasor for a covenant not to sue." 156 S.E.2d at 761. The Supreme Court later explained that "[t]he reason for allowing such a credit is to prevent an injured person from obtaining a second recovery of that part of the amount of damages sustained which has already been paid him. Or differently stated, it is almost universally held that there can be only one satisfaction for an injury or wrong." *Truesdale v. South Carolina Highway Dept.*, 264 S.C. 221, 213 S.E.2d 740 (1975).

After 1988 and the adoption of the UCATA, including Section 15-38-50, the first case that actually applied the statutory set-off was *Ellis v. Oliver*, 335 S.C. 106, 515 S.E.2d 268 (Ct. App. 1999). In *Ellis*, the plaintiff brought survival and wrongful death claims alleging medical malpractice against Dr. Oliver. The jury returned a verdict in the plaintiff's favor on both claims, awarding $411,102 for the survival action and $288,898 for the wrongful death action. The plaintiff had previously received a settlement of $140,000 from a hospital defendant. Dr. Oliver sought a set-off of the settlement by the hospital, which was granted by the trial court. In affirming the trial court, this Court explained that "[a]pplication of the settlement credit was statutorily mandated in this case. Section 15-38-50 grants the

court no discretion in determining the equities involved in applying a set-off once a release has been executed in good faith between a plaintiff and one of several joint tortfeasors." 515 S.E.2d at 272.

In sum, Dr. Bibeau is entitled to a set-off of the $40,000 that Mrs. Ethier already received for her loss of consortium. Accordingly, at most, Dr. Bibeau should be liable for $35,000 on Mrs. Ethier's consortium claim,[5] that is, in the event this Court reverses Judge Couch's ruling that the consortium claim was barred by the Ethiers' failure to prevail on Mr. Ethier's malpractice claim.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Guy R. Bibeau, M.D. respectfully requests that this Court affirm the Post-Trial Order issued by Circuit Judge Roger L. Couch and the judgment entered. In the alternative, if the Court reverses the judgment on the loss of consortium claim in favor of the Appellant Jeanne Ethier and reinstates the verdict, the Court is requested to reduce the verdict pursuant to S.C. Code Ann. § 15-38-15 and to give

[5] To recap, the calculation is as follows: thirty percent of $250,000 is $75,000 which is the apportionment adjustment under Section 15-38-15. Then, the $75,000 is reduced further by the $40,000 set-off from the settlement to arrive at the $35,000 figure.

effect to an equitable and/or statutory set-off based on the pre-trial settlement reached with Fairfield Memorial Hospital.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent Guy R. Bibeau, M.D. certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent Guy R. Bibeau, M.D. certifies that the Final Brief of Respondent complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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